Developments in November 2011

1. The Commission prolongs the State measures in favour of banks in the context of the financial crisis

On 1 December 2011, the Commission adopted a new communication that updates and prolongs from 1 January 2012 the application of state aid rules to support measures in favour of banks in the context of the financial crisis. Commissioner Almunia said that “The exacerbation of tensions in sovereign debt markets has put banks in the Union under renewed pressure, justifying the extension of the crisis rules”.

The Communication keeps in place the four Communications that set out the conditions for the compatibility of State support to financial institutions with the Treaty rules:

- the Banking Communication;
- the Recapitalisation Communication;
- the Impaired Assets Communication;
- the Restructuring Communication amended by the Prolongation Communication that extended the Restructuring Communication.

The Communication provides guidance on ensuring adequate remuneration for capital instruments that do not bear a fixed return. It explains how it will undertake a proportionate assessment of the long-term viability of banks. Also, the Commission introduces a revised methodology regarding “the remuneration of guarantees for banks’ funding needs to ensure that the fees paid by banks..."
reflect their intrinsic risk, rather than the risk related to the State or the market as a whole”.

**New Remuneration Provisions**

The Commission anticipates that State aid capital injections may in the future take the form of shares bearing a variable remuneration. The Commission will therefore assess the remuneration of such capital injections on the basis of the issue price of the shares.

Capital injections should be subscribed at a sufficient discount to the share price (after adjustment for the “dilution effect”) immediately prior to the announcement of the capital injection to give a reasonable assurance of an adequate remuneration for the State.

The remuneration will be different whether it is capital injections made to listed or unlisted banks. Thus, for listed banks the benchmark share price should be the quoted market price of shares with equivalent rights to those attaching to the shares being issued. For non-listed banks, Member States should use an appropriate market-based valuation approach since there is no such market price.

The Communication clarifies that if Member States subscribe for shares without voting rights, a higher discount may be required, the size of which should reflect the pricing differential between voting and non-voting shares in the prevailing market conditions.

**Phasing-out incentives**

Recapitalisation measures must include appropriate incentives for banks to refund State support e.g. for banks to buy back newly issued shares from the States.

**Restructuring Plan**

The Commission will continue to require Member States to submit a restructuring plan (or an update of the existing restructuring plan) within six months of the date of the Commission decision authorising rescue aid for any bank that receives public support in the form of recapitalisation or impaired asset measures. According to the accompanying Commission Press Release, “Banks which have not received public support in the form of recapitalisation or impaired asset measures, but benefited from State guaranteed funding, do not have to prepare restructuring plans. Only “heavy users” of state guarantees on their liabilities will continue to be obliged to submit viability reviews to the Commission.”

**Method of evaluation of State Guarantee**

The Commission revised guidance on the fees that banks must pay for guarantees to ensure that the aid is limited to the minimum necessary and to reflect the risk for public finances.

The pricing formula was updated to refer to median credit default swap (CDS) spreads over a three-year period ending one month before the grant of guarantees. Therefore, the updated formula “should isolate the intrinsic risk of individual banks from changes in CDS spreads of Member States and of the market as a whole. That formula should also reflect the fact that guarantees on covered bonds expose the guarantor to substantially lower risk than guarantees on unsecured debt.”

The formula applies for guarantees covering debt with a maturity between one
and five years (seven in case of covered bonds) issued on or after 1 January 2012. As a general rule, the Commission will not authorize guarantees on bank liabilities with a maturity of less than three months.

**Pooling arrangements for guarantees**

The Communication states that if Member States decide to establish pooling arrangements for guarantees on bank liabilities, the Commission will review its guidance accordingly, to ensure in particular that weight is given to CDS spreads of Member States only to the extent that they remain relevant.

**Indication of the fees due by the beneficiary**

To enable the Commission to ensure that banks, which receive guarantees, pay sufficient fees, the Member States are requested to indicate, when notifying new or prolonged guarantee schemes, an indicative fee due by the eligible bank, based on an application of the formula using recent market data.

The Communication was published in the Official Journal on 6 December 2011.

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### 2. Public consultation on review of current regime for technology transfer agreements

On 6 December 2011, the Commission launched a public consultation on the review of the current regime for the assessment of the technology transfer agreements under Article 101 TFEU (ex Article 81 EC). The 3-page questionnaire is accompanied by a study commissioned by DG Competition on the assessment of potential anticompetitive conduct in the field of intellectual property rights and assessment of the interplay between competition policy and IPR protection.

The current regime includes the **Technology Transfer Block Exemption Regulation “TTBER”** and the **explanatory Guidelines** which provide guidance on the application of the TTBER as well as on the application of Article 101 TFEU to technology transfer agreements that fall outside the scope of the TTBER.

The TTBER provides a block exemption, ensuring that certain technology transfer agreements are automatically exempt from the prohibitions of Article 101 TFEU. Thus, an agreement may benefit from the exemption if it produces positive effects pursuant to Article 101 (3) TFEU and if the combined market share of the parties does not exceed 20% on the relevant product or technology market. Where the parties are non-competitors, the market share of each of the parties must not exceed 30% on the relevant product or technology markets. The TTBER gives a list of hardcore restrictions which can never benefit from an exemption.

As a first step in the review process, the Commission is looking for comments from stakeholders “who have had direct experience of the application of the current regime for the assessment of technology transfer agreements”. In light of stakeholder’s inputs, the Commission will make a proposal for a future regime that will take into account market realities and will aim to facilitate the conclusion of technology transfer agreements that contribute to the innovation and consumer welfare.

In particular, the Commission wishes (i) to gather comments on aspect such as
whether the application of the TTBER and the Guidelines raised some problems and so in which specific sectors, (ii) to know whether the Guidelines need to be updated due to developments that could have taken place in certain industries and, (iii) to check whether the current regime address all significant competition issues related to technology transfer agreements which might have not been addressed by the current BER and guidelines.

The Commission enquires if there are reasons to review the list of hard-core restrictions and the list of excluded restrictions. Also, the Commission asks if businesses have encountered difficulties in calculating the relevant market share thresholds for the purpose of applying the Safe harbour (Article 3).

The commissioned study draws attention to certain issues that could be addressed more explicitly under the future TTBER and the future guidelines. The study points out that cross-licensing may warrant antitrust scrutiny when in specific scenarios it decreases incentives to innovate and has exclusionary effects. The report contains a review of the current antitrust treatment of patent pools. It provides some remarks on open source and concludes that antitrust authorities can be tolerant of open source agreement as long as no possible exclusion concern can arise. Also, the study raises some questions as regards pass-through clauses as a matter of IP law. The study shows that in some situations, there are good reasons to believe that pass-through clauses are likely to distort competition. However, the study recognises that given competition uncertainty that still surrounds pass-through clauses as a matter of IP law, “it would be ambitious to suggest any precise guidelines about possible antitrust aspects of such clauses”.

Contributions can be submitted until 3 February 2012.

3. The President of the General Court review the right to intervene in actions for annulment of a cartel decision

The President of the General Court has recently given decisions in the form of orders on the Schenker's applications to intervene in a number of appeals that are challenging the European Commission's decision in the air cargo cartel. Schenker is a logistics company and claimed that, as a customer of cartel members, it had a direct interest in maintaining of the Commission decision, particularly as it intends to bring damages actions based on the Commission's decision before national courts.

The President of the General Court dismissed Schenker application because it had not established a direct and existing interest in the result of the actions for annulment of the Commission Decision as requested by second paragraph of Article 40 the Statute of the Court of Justice of the EU.

The President of the General Court concludes that Schenker failed to establish how the outcome of the actions for annulment of the Commission Contested decision is likely to affect its commercial activities of supplying logistics services. Furthermore, the outcome of this case will also not harm its capacity of downstream customers to conclude contracts with Schenker or their interest in doing so, or alter Schenker's contractual rights and obligations vis-à-vis the applicants. The President also stresses that Schenker has never filed a complaint with the Commission concerning the conduct referred to in the contested decision and did not participate in the administrative procedure.

The fact that Schenker might have been affected by high prices caused by the alleged cartel did not give it a right to intervene. Schenker is just one of a very large number of undertakings which might potentially have been affected by the alleged cartel in question. It is not distinguished from the other consumers of
airfreight services. The President of the General Court considers that unlike in a previous case, Schenker failed to take steps to safeguard its rights before adoption of the contested decision.

The right to intervene is not established by virtue of Schenker's intention to bring damages actions before national courts. Schenker was required to establish that it had an interest going beyond that of the other consumers of airfreight services which might bring actions for damages and it failed to so in the present case.

The President of the General Court observes “that the purpose of the present proceedings is not to make possible or facilitate the bringing of civil actions in the national legal system, such as claims for damages. Their purpose is to review the legality of the decision by which the Commission punished the undertaking in question for infringing the rules of competition law and to review the amount of the fine consequently imposed on it”. In addition, the President sides with the Commission and stated that “Schenker’s right to claim damages as compensation for losses caused by anti-competitive practices adopted in breach of Article 101 TFEU can be exercised independently of any prior decision by the Commission”.

The orders appear to narrow the right to intervene. The President of the General Court considers that the application to intervene can be successful if the applicant has taken measures to safeguard its rights before the adoption of the contested decision. This would distinguish the intervener from other consumers. According to the orders, this is the case when an intervener has filed a complaint with the Commission concerning the conduct referred to in the contested decision and has participated in the administrative procedure before the Commission; or when an intervener has asserted its rights and its interests in a national judicial proceeding before the adoption of the Commission’s decision.

Schenker has appealed the dismissal orders.15

4. Best practices for co-operation between national authorities on multi-jurisdictional mergers adopted

In November 2011, the Commission and the heads of EU national competition authorities have agreed a set of best practices on co-operation in merger review. The adoption of the best practices follows a public consultation launched in April 2011.

The Best Practices provide clarity on how cooperation among national competition authorities will operate in multi-jurisdictional merger cases (mergers that require clearance in several Member States but not at the EU level). The best practices identify a number of steps that merging parties and third parties are encouraged to take in order to facilitate cooperation between NCAs.

The best practices are non-binding. The NCAs reserve their full discretion in the implementation of the best practices. The need for cooperation will be assessed on a case-by-case basis. However, the Best Practices foster an enhanced cooperation between the NCAs. The NCAs concerned by a merger transaction should inform the other NCAs through the existing European Competition Authorities “ECA” Notice system. The NCAs will update the information contained in the ECA in particular regarding decision to commence second phase of proceeding/in-depth investigation, remedies. The NCAs are invited to liaise at key stages of their respective investigations and may discuss their respective jurisdictional and/or substantive analyses.
The Best Practices encourage the merging parties to provide key information (e.g. the name of each jurisdiction; the date of the proposed filing in each jurisdiction; the names and activities of the merging parties; the geographic areas in which they carry on business or the sector involved) necessary to review the operation at the pre-notification stage. For this purpose and where it is permitted by law, it may be helpful for merging parties and the NCAs concerned to organise pre-notification contacts as early as possible. Also, in case of remedies in a merger that is reviewable in more than one Member State, it is the responsibility of the merging parties to "coordinate the timing and substance of remedy proposals to the NCAs concerned, so as to ensure coherent remedies and to avoid inconsistent remedies".

As it will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger, the merging and other interested parties may conclude that it is in their interest to waive confidentiality protections because they believe this may increase the likelihood of consistent analyses and compatible enforcement decisions (ICN Model Waiver Form at the end of the document). This should enable more effective communication between the NCAs regarding evidence that is relevant to the assessment but once “waiver has been provided the NCAs concerned will share the information covered by the waiver without further notice to the parties”.

5. New DG Competition Brochure: Compliance matters “What companies can do better to respect EU competition rules"

The DG Competition published a new brochure on 23 November 2011 entitled “Compliance with competition rules: what’s in it for business?”

The 23-page publication “aims to help companies, in particular small and medium-sized ones, to develop a proactive compliance strategy. It summarises the key competition rules companies should respect and sets out generally recognized basic methods to help companies ensure compliance with EU competition rules”.

The purpose of an internal compliance strategy is “to raise awareness of potential conflicts with EU competition law and disseminate adequate knowledge of how to avoid them at all levels of the company, from employees to top management”. The brochure explains the importance of compliance, it summarises the key rules and sets out practical steps that can be taken to ensure compliance with EU competition rules. In particular, it reviews the key elements that should be included in a compliance strategy.

Also, it explains the Commission's attitude toward companies' compliance efforts but reminds that a compliance programme put in place by a company has no positive impact on the level of fines. “The purpose of a compliance programme should be to avoid an infringement in the first place” but not to support the argument that the fine to be imposed should be reduced.

Commissioner Almunia said that “adopting such a responsible attitude (a compliance programme) can save a lot of additional costs and maintain a good business reputation. It is also the best way to prevent consumer harm”.

Footnotes

1. Communication from the Commission on the application, from 1 January 2012, of


7. IP/11/1488 1 December 2012 “Commission extends crisis rules for banks”


9. This study was produced by Pierre Regibeau (CRA, Imperial College and CEPR) and Katharine Rockett (University of Essex and CEPR)


13. PROTOCOL (No 3) on the Statute of the Court of Justice of the European Union


16. Best Practices on Cooperation between EU National Competition Authorities in Merger Review – Adopted 8 November 2011

17. For more information, please refer to our e-competition bulletin - Developments in April 2011

18. For more information: http://ec.europa.eu/competition/antitrust/compliance/index_en.html


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